No. 12,465

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN WALDON,

Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", denying appellant's petition for a writ of habeas corpus. (Tr. 63.) The Court below had jurisdiction over the habeas corpus proceedings under

Title 28 U.S.C.A. Sections 2241, 2243 and 2255.

Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by

Title 28 U.S.C.A. Section 2253.

STATEMENT OF THE CASE.

The facts leading up to the filing of the instant petition for writ of habeas corpus and the contentions alleged therein are substantially set forth in the Memorandum Opinion of the trial Judge, the Honorable Walter C. Lindley, denying the appellant's motion to vacate his judgment and sentence,

Waldon v. United States (E. Dist. Ill.), 84 Fed. Supp. 449.

After the filing of the petition by the appellant, an inmate of the United States Penitentiary at Alcatraz, California (Tr. 2-11), the Court below issued an order to show cause (Tr. 21-22), the appellee filed a return to order to show cause (Tr. 22-50), and the appellant filed a traverse to return to order to show cause (Tr. 51-62). Thereafter the matter was submitted and the Court below filed the following order denying the petition for writ of habeas corpus:

> "The petition for writ of habeas corpus filed by petitioner on October 20, 1949, is hereby denied upon the authority of the following cases:
>
> McNally v. Hill, 293 U. S. 131, 55 S. Ct. 24;
> Redmon v. Squier, 162 F. 2d 195;
> Waldon v. U. S., 84 F. Supp. 449.
>
> /s/ Herbert W. Erskine,
> U. S. District Judge.
>
> [Endorsed]: Filed Nov. 23, 1949." (Tr. 63).

From this order appellant now appeals to this Honorable Court. (Tr. 63-64.)

ISSUES.

The issues involved herein may, in substance, be stated as follows:

Is the appellant entitled to relief by habeas corpus because

1. women were excluded from the trial jury panel, whose members convicted him in the Eastern District of Illinois in February of 1940?

and because

2. he was sentenced to fine and imprisonment under authority of a statute where only imprisonment was permitted and such fine was partially paid by distraint of his personal property before judgment was corrected in his absence to eliminate the fine?

ARGUMENT.

In *Waldon v. United States,* supra, Judge Lindley thoroughly considered the above contentions and adequately and effectively disposed of them when he denied appellant's motion to vacate his judgment and sentence. Accordingly, appellee adopts *in toto* as his argument in this appeal this Memorandum Opinion of Judge Lindley, the authorities cited therein, and the reasoning in support thereof, supplemented by the decisions of this Honorable Court in

Redmon v. Squier, 162 F. (2d) 195;

Kelly v. Squier, 166 F. (2d) 731, certiorari denied, 334 U. S. 849; and

McDonald v. Johnston, 149 F. (2d) 768,

together with the opinion of the Supreme Court of the United States in

McNally v. Hill, 293 U. S. 131.

In *Redmon v. Squier,* supra, cited with approval in *Kelly v. Squier,* supra, this Honorable Court held that objections to a jury panel can not be raised by habeas corpus. Appellant argues that this Court overruled this holding in a subsequent opinion in the case of

Rogers v. Squier, 174 F. (2d) 348.

A reading of this latter case shows no such intention on the part of this Court. As a matter of fact, in the *Rogers* case, this Court held that an attack upon a jury panel "is waived unless seasonable objection has been interposed *in some appropriate way*". (Italics supplied.) In our case at bar, it can not be said that the objection was interposed in an "appropriate way" for the reason that appellant, after making a motion to quash the petit jury panel on the ground that women were excluded therefrom, abandoned the objection by failing to argue it on appeal before the Appellate Court, and accordingly, precluded himself from raising the objection in a collateral proceeding, assuming, arguendo, that such an attack is cognizable in habeas corpus. Furthermore, under the facts of this particular case, the exclusion of women from the trial jury panel, the members of which convicted the appellant, was not improper but, on the contrary, as Judge Lindley indicated in his Memorandum Opinion, was at that time in conformity with prevailing practice in

Illinois, approved by the Supreme Court of the United States in

Glasser v. United States, 315 U. S. 60.

Equally without merit is the contention of the appellant that he has suffered double jeopardy because he was sentenced to fine and imprisonment under authority of a statute where only imprisonment was permitted and such fine was partially paid, as are also without merit appellant's further contentions that the imposition of the fine voided the judgment as did the correction of the judgment eliminating the fine, because it was done outside the presence of the said appellant. These contentions, as above indicated, have been effectively answered by Judge Lindley and need no further amplification from the appellee, except to add that it is well settled that where a Court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence a nullity, but leaves open to attack on habeas corpus only such portion of the sentence as is excessive. *McDonald v. Johnston,* supra. It should be noted that in the cases cited by the appellant where defendants were released after payment of fine, the statute imposed either imprisonment or a fine in the alternative. That a sentence may be reduced without the defendant being present is so fundamental as to need no argument.

Appellant relies on the decision of this Court in

Johnston v. Lagomarsino, 88 F. (2d) 86,

but conceding, for argument's sake, that this decision is applicable in our case at bar, the appellant nonetheless is not entitled to his release from the custody of the appellee, the Warden of the United States Penitentiary at Alcatraz, California, because he has not as yet served a term of imprisonment totaling 25 years, which, it goes without saying, is the valid portion of the judgment heretofore imposed against him. *McNally v. Hill,* supra.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the decision of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
June 28, 1950.

FRANK J. HENNESSY,
United States Attorney,

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Assistant United States Attorney,

Attorneys for Appellee.